RE: Proposed New Rule re Recording Time
5/7&8/04 Commission Meeting
Open Session Item III.G.

ANTHONIE M. VOOGD

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INTER-OFFICE MEMORANDUM

TO: THE MEMBERS OF THE COMMISSION
FROM: A.M. VOOGD
RE: NEW RULE -RECORDING TIME
DATE: 03-25-04

The attachments show the evolution of the draft rule as well as including recent proposed legislation relating to the rule. My latest variant of the proposed rule follows:

> Recording Time. A member shall maintain accurate records of time expended on legal services for a client where the member's fee is based upon the time expended by the member or where the client requests the maintenance of such records. Such records shall be founded upon written or electronic notations made in a manner substantially contemporaneously with expending the time and shall briefly describe the particular services provided. Copies of such records shall be provided to the client promptly upon request and shall be maintained for a period of two years.

There is an inherent conflict of interests associated with a lawyer negotiating a fee agreement with a prospective client. If the client were to be represented by separate counsel for purposes of those negotiations that

separate counsel might well request inclusion of provisions tracking the proposed rule in the agreement. I suspect that no lawyer could reasonably object to such a request. Under those circumstances the rule simply serves to alleviate the inherent conflict between lawyers and clients in establishing the relationship.

Moreover, Assembly Bill 2371 shows that unless we are proactive we will cease being a self-regulated profession.

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INTER-OFFICE MEMORANDUM

TO: THE MEMBERS OF THE COMMISSION
FROM: A.M. VOOGD
RE: NEW RULE -RECORDING TIME
DATE: 02-05-04

The attachments show the evolution of the draft rule as well as including recent proposed legislation relating to the rule. My latest variant of the proposed rule follows:

> Recording Time. A member shall maintain accurate records of time expended on legal services for a client where the member's fee is based upon the time expended by the member or where the client requests the maintenance of such records. Such records shall be founded upon written or electronic notations made in a manner substantially contemporaneously with expending the time and shall briefly describe the particular services provided. Copies of such records shall be provided to the client promptly upon request and shall be maintained for a period of two years.

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INTER-OFFICE MEMORANDUM

TO: E. PECK
FROM: A.M. VOOGD
RE: TIMEKEEPING RULE
DATE: 6/10/03

My first draft rule was rejected by the Commission on the basis such a rule was not needed and keeping contemporaneous time was too difficult.

My next report to the Commission will address these concerns. Prior to issuing it, I want the benefit of your sage advice on the following.

I have collected various materials that seem to support my position. Copies are attached. Included are of a May 13, 2003 letter from Gerald Phillips and enclosures. Also included is the ABA Commission on billable Hours Report 2001-2002. Finally, I have attached copies of the following articles: 1) "It's the Money, Stupid" that appeared on page 76 of the February 2001 issue of the ABA Journal and reviewed Deborah Rhode's book on reforming the legal profession; and 2) "The Pig Factor" by Rudolph W. Giuliani that appeared in the May/June 2003 issue of Across the Board.

Inquiries made of fellow lawyers suggest that almost every firm has a lawyer or lawyers that defer preparation of time records until the end of the billing period. The information is not surprising. As a class, lawyers have more than their fair share of procrastinators. It is too easy to get away with procrastinating on timekeeping.

When I was a fresh-caught lawyer back in the '60s, I tried preparing time sheets monthly. It is impossible to prepare accurate time records days after the time was expended. A properly maintained time sheet might have twenty entries each having a different time period. You can't accurate create a time sheet of that nature days or weeks after the day in question. Memories are not that good. When you record time monthly, you are not recording time actually expended. You are trying to fill in blocks of empty time.

I switched to keeping concurrent time. I kept a time sheet on my desk and made entries on time expended on an ongoing basis. I also insured the sheet was complete at the end of the day. The form of time sheet provided by my firm had a legend at the top stating "KEEPING ACCURATE TIME IS A PROFESSIONAL RESPONSIBILITY." The memory of this legend motivated the proposed rule

Concurrent time keeping is not difficult. After a while it becomes almost instinctive. After I commenced concurrent time keeping, it soon became apparent that getting six billable hours in a normal working day is very difficult. Social conversations with lawyers and staff, prolonged lunches, trips to the bathroom, partnership meetings and the like eat up a considerable amount of time. These are the activities you readily forget if you try to prepare your time monthly. This is particularly true if you are trying to meet a firm standard of generating a specific number of hours a year.

Selling services on an hourly rate basis not unique to the legal profession. Over the years, I have worked on contracts where my company has purchased millions of dollars of services from construction subcontractors on an hourly rate basis. The requirements of those contracts are uniform. At the end of each working day, the subcontractor submits time sheets reflecting the hours expended by each of the subcontractor's employees working on the project. The time sheets are reviewed by an on-site representative of our company and approved the same or following day. Daily approval may not be feasible, but I don't understand why lawyers cannot meet standards readily fulfilled by welders and laborers.

I have reviewed retainer agreements used by reputable law firms. They usually provide something along the lines of the following:

> "Our professional fees for legal services will be determine by the amount of time our attorneys, paralegals and other timekeepers spend on this engagement and based on their applicable hourly rates in effect at the time our invoices are rendered. My present applicable hourly rate is $____."

Agreements of this nature do not provide that the hours spent will be estimated once a month. Read reasonably, these agreements require that the client pay for the actual hours expended, not the estimated hours. Billing estimated hours at a minimum is a breach of the implied covenant of good faith and fair dealing, if not a species of fraud. Moreover, B&P §6148 does not authorize inaccurate timekeeping.

Assume a lawyer proposes to use a contractor for personal home improvements. The contractor and his employees will be in and out of the home at various times over a period of time. Compensation is to be made on an hourly rate basis. The contemplated contract provides that the hours expended will be estimate monthly. No sensible lawyer would sign such a contract. Yet, many lawyers believe they are entitled to assume that their clients will accede to estimated timekeeping.

Years ago I was in federal court during a hearing on the fee application of a reputable class action law firm. The judge pointed out that the firm had another fee application relating to a different class action pending before another judge of the court. He gave lawyer appearing on behalf of the firm a choice. He could either submit a more reasonable fee application or let the judge compare the two fee applications to determine whether any lawyers in the firm had worked more than 24 hours in a given day. The lawyer immediately opted to submit a revised application.

As you know, insurance companies retain experts to review lawyer invoices. An adjuster with an insurer formerly used by my company told

me that by use of such experts they frequently cut invoices by 20% or more. The experts have only one way of determining whether the stated time has in fact been expended. They apply standards showing how long a particular task should take and then apply an invoice reduction. The insurer then gives the lawyer a chance to justify the invoice. In the normal course, the invoice would be justified by contemporaneously maintained time sheets. This is seldom done which suggests that the lawyers are not keeping good time.

Other sophisticated bill payers such as general counsel use like methods of determining whether time purportedly expended is reasonable under the circumstances. It is, of course, the unsophisticated purchaser of legal services who is at risk of being abused by slovenly timekeeping practices.

I have discussed time keeping with various individuals who pay attorneys on an hourly rate basis for personal services or for services for companies where the individuals have bill paying responsibility. They share a strong concern that their attorneys' time is not being accurately recorded.

Gerald Phillips in the attached Time Bandits article states:

> "The fact that lawyers are held in very low esteem is without dispute. While the causes of this poor standing are varied and worth debating, it is clear that overbilling is partly responsible. Time padding and task padding are major reasons for the low image of lawyers. These practices improperly escalate the fees billed to client and thus cause great consternation among the public."

The Commission's Charter from the Board of Governors specifically requests that we "develop proposed amendments to the California Rules that: 3) Promote confidence in the legal profession . . . ." The proposed rule would serve that purpose, even assuming that California lawyers keep perfect time.

However, the evidence is clear that there is a timekeeping problem. Failure of the Commission to address it lends credence to Sandra Rhodes' complaint that lawyer self-regulation means that the fox is guarding the chicken house.

Moreover, it is important that we stay ahead of the Legislature on issues of this nature. Rules 3-120 (Sexual Relations with Client) and 3-500 (Communication) are examples of situations where the Legislature forced State Bar action. Giuliani's "Pig Factor" article suggests that the bar will be faced by more onerous requirements unless it acts first.

If nothing else, a proposed timekeeping rule would generate some interest by members of the bar in the rule making process.

I have revised the proposed rule in the manner indicated below to reflect the foregoing comments.

> Recording Time. A member shall maintain accurate records of time expended on legal services for a client where the member's fee is based in upon the time expended by the member. Such records shall be founded upon written or electronic notations made in a manner substantially contemporaneously with expending the time and shall briefly describe the particular services provided. Copies of such records shall be provided to the client promptly upon request and shall be maintained for a period of two years.

I look forward to discussing this matter with you at your convenience.

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INTER-OFFICE MEMORANDUM

TO: THE MEMBERS OF THE COMMISSION
FROM: A.M. VOOGD
RE: NEW RULE -RECORDING TIME
DATE: 4/16/03

The following draft of a proposed new rule is submitted for consideration by the Commission agreeably with Harry's invitation of some time ago:

Recording Time. A member shall maintain accurate records of time expended on legal services for a client where the member's fee is based in whole or in part upon the time expended by the member or where the client requests the maintenance of such records. Such records shall be founded upon written or electronic notations made contemporaneously with expending the time and shall briefly describe the particular services provided. Copies of such records shall be provided to the client promptly upon request.

Keeping accurate track of time expended is a fundamental professional obligation where the fee is founded upon time expended. Even where the fee is not time based, the obligation of the member to account for work performed on behalf of the client arises out of the fiduciary duty owed the client. Moreover, it provides a means for the client to insure that the employment is being pursued diligently by the member.

The proposed rule does not impose a substantial burden upon members. Most lawyers maintain such records as a matter of course. Regrettably, many lawyers don't keep such records to the detriment of their clients.

The proposed rule will protect the reasonable interests of the public.

To: Lauren McCurdy

for Commission distribution

Date: May 3, 2004

Subject: Comment on Proposed Rule Recording Time.

Are we going to legislate a prohibition against block billing? Tony's language can be read that way; but I don't think we should do that.

ASSEMBLY BILL No. 2371

Introduced by Assembly Member Bates

February 19, 2004

An act to amend Sections 6147 and 6157.2 of, and to add Section 6147.1 to, the Business and Professions Code, relating to attorneys.

LEGISLATIVE COUNSEL'S DIGEST

AB 2371, as introduced, Bates. Attorneys: Legal Consumers' Protection Act.

Existing law requires an attorney who contracts to represent a plaintiff on a contingency fee basis, in any case other than a contract for recovery of workers' compensation benefits, to provide specified information to the plaintiff at the time the contract is entered into.

This bill would enact the Legal Consumers' Protection Act, which would require a contingency fee attorney to make certain disclosures and reports to a potential or existing client regarding (1) chances of success in the case, (2) estimated and actual attorney hours, (3) estimated fees, and (4) other fee information. The act would prohibit an attorney, or his or her representative, from making unsolicited contact with a potential claimant for at least 45 days after an event resulting in personal injury or death that could give rise to a cause of action. The act would also give the consumer the right to request an objective review of a contingency fee by a court or bar association committee, and to seek specified remedies against an attorney violating any of the above provisions.

Existing law provides for certain limitations on attorney advertising, including an offer of representation on a contingent basis unless it

includes a statement advising whether the client will be held responsible for any costs advanced by the attorney when no recovery is obtained.

This bill would also require the statement to disclose whether costs advanced will be added to the fee if the litigation is successful, and, if the statement uses the word or phrases ''free,'' ''no legal fee,'' ''no fee,'' ''no expense,'' or another similar phrase, requires the statement to include whether or not the client will be responsible for costs associated with litigation and to include the contingency fee or range of fees that will be charged by the attorney if the litigation is successful. The bill would also define terms.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. This Act shall be called and may be cited as the Legal Consumers' Protection Act.

SEC. 2. The Legislature finds and declares all of the following:

(a) For the average person, the legal process is confusing and expensive. Where damages are sought, the contingency fee system allows an individual to defer expenses and thus obtain legal representation that otherwise might be prohibitively costly. Like consumers of any service, legal consumers can make meaningful choices only when they are empowered with information in advance of entering into a representation agreement with an attorney. Consumers under sales pressure or otherwise emotionally distraught may find their ability to make rational choices impeded. For this reason, consumer protection statutes contain provisions such as a ''cooling off'' period during which a contract can be rescinded.

(b) One of the ways that the system fails to protect legal consumers is in allowing attorneys to contact potential clients as soon as they have been injured or have lost a loved one. Immediately after an injury or loss, a potential client is not in a position to bargain in a fair and equitable manner with an experienced contingency fee lawyer. For that reason, federal law prohibits lawyers from soliciting clients in air crash cases for 45 days. A person who has been injured in a hotel fire or an auto accident is no less vulnerable to such solicitation than a victim of

an air crash. This bill would simply extend to all California consumers of legal services the same protection from solicitation that already exists as a matter of federal law for victims of airplane accidents and their families.

(c) Similarly, advertisements aimed at attracting potential contingency fee clients should be informative and unambiguous. Yet many ads provide little information to potential clients, and, in many ads by lawyers, the word FREE predominates. Other vital information, such as the potential cost of the representation to the consumer, if provided at all, may appear in much smaller print at the bottom of the page. Consumers may be led to believe that they will be receiving something for nothing. California, a state in which false and deceptive trade practices are not tolerated, should assure that legal advertisements provide consumers of legal services with adequate information.

(d) Legal consumers should also be provided with enough information regarding the contingency fee agreement to enable them to make informed choices regarding their legal options. Before a client signs a contingency fee contract, the attorney should be required to present the terms of the contingency fee representation in writing to the client in clear and simple language. In California, when someone takes his or her car to be repaired, he or she has a right to a written estimate of the cost of the work before any work is performed and an accounting of the work done and additional costs, such as parts supplied. Consumers of legal services deserve the same basic protections that are given to consumers of auto repair services.

(e) Current law takes a step in the right direction by requiring attorneys to put contingency fee agreements in writing and to provide consumers with information such as the fee percentage and how costs will be deducted from the settlement or verdict. Consumers need more information, however, before deciding whether to enter into a contingency fee contract with an attorney. Clients also need to be informed regarding the likelihood of success of a claim and the amount of time and effort that an attorney is going to invest in the case. This will allow the consumer to make a reasoned judgment about whether the contingency fee is fair under the circumstances.

(f) The purposes of this act are to provide a Legal Consumers' Protection Act for every injured person in California who may

need the services of a contingency fee lawyer, to promote the free flow of information between injured consumers and contingency fee lawyers, and to lessen economic burdens on the public.

SEC. 3. Section 6147 of the Business and Professions Code is amended to read:

6147. (a) *An attorney and any of his or her representatives shall not make unsolicited contact with a potential claimant for at least 45 days after an event resulting in personal injury or death that could give rise to a cause of action by that claimant.*

(b) An attorney who contracts to represent a client on a contingency fee basis, shall, at the initial meeting, disclose to the potential client his or her right to receive a copy of the statement described in subdivision (c).

(c) An attorney retained by a claimant on a contingency fee basis shall, at least five days prior to the signing of a contingency fee contract but not later than 30 days after the initial meeting, provide a duplicate copy of a disclosure statement, signed by both the attorney and the potential client or the potential client's guardian or representative, to the potential client or to the potential client's guardian or representative. The disclosure statement shall be in writing and shall include the following information:

(1) The estimated number of hours of the attorney's services that will be spent in settling the claim and the estimated number of hours of the attorney's services that will be spent handling the claim through trial.

(2) (A) The attorney's contingency fee rate for services regarding the claim and any conditions, limitations, restrictions, or other qualifications on that fee that the attorney deems appropriate.

(B) A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery.

(C) All other fee agreements to be made concerning the claim, including the amount to be paid to any co-counsel associated with the case or any agreement to refer the client to another attorney in exchange for a referral fee.

(3) The estimated likelihood of success on the merits or of a settlement of the case.

(d) An attorney who contracts to represent a client on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client, or the client's guardian or representative, to the plaintiff, or to the client's guardian or representative. The contract shall be in writing and shall include, but is not limited to, all of the following:

(1) A statement of the contingency fee rate that the client and attorney have agreed upon.

(2) A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery.

(3) A statement as to what extent, if any, the client could be required to pay any compensation to the attorney for related matters that arise out of their relationship *and that are* not covered by their contingency fee contract. This may include any amounts collected for the plaintiff by the attorney.

(4) Unless the claim is subject to the provisions of Section 6146, a statement that the fee is not set by law but is negotiable between attorney and client.

(5) If the claim is subject to the provisions of Section 6146, a statement that the rates set forth in that section are the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate.

~~(b)~~

(e) A client retaining a lawyer on a contingency fee basis shall be afforded three working days in which to rescind the contract for any reason.

(f) An attorney retained by a client on a contingency fee basis shall keep accurate records of the time spent on the client's case and, during the pendency of the claim, shall give monthly reports to the client on time spent, work performed, and progress made in the case.

(g) An attorney retained by a client on a contingency fee basis shall, within a reasonable time not later than 30 days after the claim is finally settled or adjudicated, disclose in a written statement to the client the following information:

(1) The actual number of hours of attorney services performed in connection with the claim.

(2) The total amount of the contingency fee for attorney services performed in connection with the claim.

(3) The actual fee per hour of the attorney's services performed in connection with the claim, determined by dividing the total contingency fee by the actual number of hours of attorney services.

(h) A client has the right to request an objective review of a contingency fee by a court or a bar association committee to ensure that it is reasonable and fair under the circumstances, based on factors including, but not limited to, all of the following:

(1) Whether liability was contested.

(2) Whether the amount of damages was clear.

(3) How much actual time an attorney reasonably spent on the case.

(i) The following remedies shall apply to a violation of this section:

(1) Failure to comply with any provision of this section renders the agreement voidable at the option of the ~~plaintiff~~ *client,* and the attorney shall thereupon be entitled to collect a reasonable fee.

~~(c)~~

(2) A client to whom an attorney fails to disclose information required by this section may, as an alternative to or in addition to the remedy in paragraph (1), bring a civil action for damages in the court in which the claim was or could have been brought.

(3) An attorney who intentionally fails to disclose to a client any information required by this section shall additionally be liable for exemplary damages.

(i) The remedies provided for in this section shall be in addition to, and not in lieu of, any other available remedies or penalties.

(j) This section shall not apply to contingency fee contracts for the recovery of workers' compensation benefits.

~~(d) This section shall become operative on January 1, 2000.~~

SEC. 4. Section 6147.1 is added to the Business and Professions Code, to read:

6147.1. For purposes of Sections 6147 and 6157.2, the following terms have the following meanings:

(a) ''Attorney'' means any natural person, professional law association, corporation, or partnership authorized under the applicable laws of this state to practice law.

(b) ''Attorney services'' means the professional advice of, counseling of, or representation by an attorney. ''Attorney

services'' do not include other assistance provided, directly or indirectly, in connection with an attorney's services, such as administrative or secretarial assistance, overhead, travel expenses, witness fees, or preparation by a person other than the attorney of a study, analysis, report, or test.

(c) ''Claim'' means a civil action for wrongful death or personal injury brought in a court of this state.

(d) ''Claimant'' means any of the following:

(1) A natural person who brings a claim.

(2) If a claim is brought on behalf of a deceased person's estate, the personal representative of the deceased person or the estate.

(3) If a claim is brought on behalf of a minor or incompetent, that person's parent, guardian, or personal representative.

''Claimant'' does not include an artificial organization or legal entity, including, but not limited to, a firm, corporation, association, company, partnership, society, joint venture, or governmental body.

(e) ''Contingency fee'' means the cost or price of an attorney's services determined by applying a specified percentage, which may be a firm fixed percentage, a graduated or sliding percentage, or any combination thereof, to the amount of a settlement or judgment obtained on a claim.

(f) ''Initial meeting'' means the first conference or discussion between a client and an attorney, whether by telephone or in person, of the details, facts, or basis of a claim.

(g) ''Retain'' means the act of a claimant in engaging an attorney's services, whether by express agreement or impliedly by seeking and obtaining the attorney's services.

SEC. 5. Section 6157.2 of the Business and Professions Code is amended to read:

6157.2. No advertisement shall contain or refer to any of the following:

(a) Any guarantee or warranty regarding the outcome of a legal matter as a result of representation by the member.

(b) Statements or symbols stating that the member featured in the advertisement can generally obtain immediate cash or quick settlements.

(c) (1) An impersonation of the name, voice, photograph, or electronic image of any person other than the lawyer, directly or implicitly purporting to be that of a lawyer.

(2) An impersonation of the name, voice, photograph, or electronic image of any person, directly or implicitly purporting to be a client of the member featured in the advertisement, or a dramatization of events, unless disclosure of the impersonation or dramatization is made in the advertisement.

(3) A spokesperson, including a celebrity spokesperson, unless there is disclosure of the spokesperson's title.

(d) A statement that a member offers representation on a contingent basis unless the statement also advises whether a client will be held responsible for any costs advanced by the member when no recovery is obtained on behalf of the client *and whether the cost shall be added to the fee if the litigation is successful. If the statement uses the word "free," or the phrases "no legal fee," "no fee," "no expense," or any other phrases indicating that services are provided at no cost to the client, the statement must also provide, in the same size print as the above statement, a statement regarding whether or not the client will be responsible for the costs associated with litigation and the possible range of contingency fees that will be charged by the attorney if the client does recover.* If the client will not be held responsible for costs, no disclosure is required.

O